

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by Velma Korbelt, Commissioner, Department of Human Rights, Complainant, Lisa Harvey, Complainant-Intervenor, v. Marion Wardell, Respondent.	FINDINGS OF FACT, CONCLUSIONS AND ORDER
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The above-entitled matter involves a housing discrimination claim brought pursuant to the Minnesota Human Rights Act (hereinafter "MHRA") against a landowner in Minneapolis, Minnesota.

Angela Behrens, Esq., Assistant Attorney General appeared on behalf of the Complainant, Velma Korbelt, Commissioner of the Minnesota Department of Human Rights ("the Commissioner" or "the Department"). Leal E. Robertson, Esq., Legal Aid Society of Minneapolis, appeared on behalf of the Complainant-Intervenor, Lisa Harvey ("Harvey"). William G. Clelland, Esq., Carson, Clelland & Schreder, appeared on behalf of the Respondent, Marion Wardell ("Wardell" or "Respondent").

This matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing on June 25 and 26, 2008. Following the receipt of post-hearing submissions from the parties, the hearing record closed on July 16, 2008.

STATEMENT OF THE ISSUE

Whether Marion Wardell, in violation of Minn. Stat. § 363A.09, subdivision 1, clause (2), discriminated against Lisa Harvey in the terms or conditions of renting real property on account of Ms. Harvey's "status with regard to public assistance"?

The record establishes that Marion Wardell unfairly discriminated against Lisa Harvey in the terms of the leasing of real property and that it is appropriate to impose a civil penalty and grant of other relief.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. As part of a larger federal program of housing assistance, the U.S. Department of Housing and Urban Development (“HUD”) provides funds to local public housing agencies for use in providing rent subsidies to certain low-income and elderly persons. These federal funds are provided to underwrite housing program vouchers issued by the locally-based public housing agencies, according to terms established by HUD.¹

2. Through the Housing Choice Voucher Program – known more widely as the “Section 8” housing program – HUD develops and adopts a schedule of “fair market rents” for various “market areas” across the United States. With this listing of “fair market rents,” a local public housing authority administering the voucher program then develops a set of payment standards for use in apportioning an appropriate amount of assistance to each family served by the program. Accordingly, at any one time, the local public housing authority will have a set of payment standards that it will use to cap the amount of assistance it provides for various types of apartments – for example, there are different payment standards for studio apartments, 1-bedroom apartments, 2-bedroom apartments, and so on.²

3. Both the “fair market rents” determined by federal officials in Washington, D.C., and the payment standards used by local public housing authorities, can either increase or decrease over time. For example, on the date of the hearing, the maximum payment standard used by the Minneapolis Public Housing Authority (“MPHA”) for a 2-bedroom apartment was \$941. This amount was less than the \$951 payment standard used for such an apartment in 2004. This decrease is noteworthy because the more recent payment standards and fair market rents associated with 3-bedroom apartments were both higher than those that were in use in 2004.³ Thus, as best as they can, government officials attempt to track rental markets in communities across the United States so as to apportion and distribute federal housing assistance.

¹ Testimony of Rita Yetzen; 24 C.F.R. § 982.1 (2008).

² Test. R. Yetzen; 24 C.F.R. §§ 888.113, 982.503 (2008).

³ Test. R. Yetzen; Exs. 205 and 205-B.

4. Since 1989, Marion Wardell has owned and leased apartments at 3735 Columbus Avenue South, in Minneapolis, Minnesota. The building includes four, substantially similar units.⁴

5. In the 1990's, Ms. Wardell received a Rehabilitation Loan from the Minneapolis Public Housing Authority ("MPHA") to make improvements to the Columbus Avenue building. Since that time apartments in the building have been rented to clients of the Housing Choice Voucher Program.⁵

6. Among the Housing Choice Voucher Program clients to whom Ms. Wardell has rented apartments in the Columbus Avenue building are Juan Ramos and Stephanie Nelson. Mr. Ramos was a tenant from October 2003 to January 2007. Ms. Nelson was a tenant from October 2003 to October 2004. During their respective tenancies, total rents agreed-to for Mr. Ramos' unit and Ms. Nelson's unit were \$800 per month.⁶

7. While Ms. Wardell owns and operates the Columbus Avenue apartments on her own, as part of a separate partnership with her son, Karl Jorgenson, she has an ownership stake in five other rental properties in Minneapolis.⁷

8. Lisa Harvey is a client of, and receives assistance from, the Housing Choice Voucher Program.⁸

9. During 2006, Ms. Harvey and her son were living with Ms. Harvey's mother, but were looking for an apartment of their own.⁹

10. In early July 2006, Ms. Harvey saw an advertisement for a two-bedroom apartment at 3735 Columbus Avenue South; a location that was a short distance from her mother's home on the 3800 block of Columbus Avenue South. The advertisement stated that the monthly rent for the unit was \$650 and signaled that the landlord was "OK" with rental applications from "Section 8" clients.¹⁰

11. After reading the advertisement, Ms. Harvey telephoned Ms. Wardell and expressed interest in viewing the apartment that had been advertised. Because Ms. Harvey was the holder of a housing voucher issued by the Minneapolis Public Housing Authority, Harvey inquired of Wardell whether she was willing to participate in the

⁴ Testimony of Marion Wardell; Testimony of Karl Jorgenson.

⁵ *Id.*

⁶ Exs. 202, 203 and 204.

⁷ Exs. 11 and 12; Test. of M. Wardell; Test of K. Jorgenson.

⁸ Exs. 8 and 206-21; Testimony of Rita Ytzen; Test. of L. Harvey.

⁹ Testimony of Lisa Harvey; Testimony of Diane Harvey.

¹⁰ Exhibits 1, 10; Test. of L. Harvey; Test. of M. Wardell.

“Section 8” housing program for low-income tenants. Ms. Wardell replied that she did participate in the program and rent apartments to program clients.¹¹

12. Not long after this conversation, Ms. Harvey toured the apartment and completed a rental application for the vacant unit.¹²

13. Harvey and Wardell agreed to meet a second time, on July 25, 2006, to finalize both the lease arrangements as well as a Request for Tenancy Approval (RTA) to the Minneapolis Public Housing Authority. The RTA document is completed jointly by a tenant and a property owner when the tenant and owner agree to enter into a lease.¹³

14. Because the floors of the apartment that had been advertised were being refurbished at this time, the two agreed to hold their July 25 meeting at the Columbus Avenue home of Ms. Harvey’s mother.¹⁴

15. From Ms. Harvey’s perspective, there was considerable urgency to complete the rental agreement. Her rental assistance voucher from the MPHA was scheduled to expire on the next day, July 26, 2006. When such a voucher expires, its holder must wait to reapply to MPHA’s waiting list. The current waiting list includes approximately 15,000 other families and the waiting list only opens to receive new applications for entry once every five years. Moreover, those persons who are awarded a voucher, and successfully use it to obtain housing, may continue to receive assistance so long as they meet income and programmatic requirements for participation in the program. For these reasons, therefore, if the lease arrangement with Wardell was not concluded quickly, it was possible that MPHA officials would send Ms. Harvey and her son to the back of a long and slow-moving line for rental assistance.¹⁵

16. For her part, Ms. Wardell uses her interview to appraise prospective tenants. She testified that looking to the applicant’s general demeanor and attitude – specifically whether the prospective applicant is “a nice, sensible person” – composes “90 percent” of her decision-making process as to whether to enter into a lease with a prospective tenant.¹⁶

17. From the start of the second meeting, Ms. Harvey and Ms. Wardell clashed. The two quibbled over whether it was a better practice for the children who lived in the building to prop open the front door while playing outside, or instead carry keys to unlock a door that otherwise remained shut. Wardell did not mind tenants propping open the door to the building during daytime hours; whereas Harvey believed

¹¹ Test. of L. Harvey; Test. of M. Wardell.

¹² *Id.*

¹³ Test. of R. Ytzen; Test. of L. Harvey.

¹⁴ Test. of L. Harvey; Test. of M. Wardell.

¹⁵ Test. of R. Ytzen; Test. of L. Harvey; Ex. 8.

¹⁶ Test. of M. Wardell.

this practice undermined the security of the building. Moreover, each woman regarded the other's views on this subject as improvident and wrong-headed.¹⁷

18. Referring to Mr. Ramos, Ms. Wardell told Harvey that she was currently receiving \$800 per month for a unit that was rented by a tenant who was enrolled in the Section 8 voucher program. Wardell then asked Harvey to inquire of officials at the MPHA whether they would likewise approve a payment of \$800 per month for an apartment for Harvey. Noting that the advertised rent for the unit was \$650 per month, Ms. Harvey refused to ask the MPHA for the additional sum. With this reply, Ms. Wardell declared that "this is not going to work" and left the elder Harvey's home without completing the lease or the Request for Tenancy Approval.¹⁸

19. Notwithstanding a later warning from MPHA Case Worker Ryan Humphries, to the effect that Wardell was unlawfully discriminating against Harvey if Wardell refused to enter a lease with Harvey at a rent of \$650 per month; Wardell refused to rent the advertised apartment to Ms. Harvey.¹⁹

20. Ms. Wardell later entered into a lease for this apartment with two tenants who were not receiving public assistance in return for a total of \$650 per month in rent.²⁰

21. Ms. Harvey was later able to rent an apartment in Minneapolis – although one that she preferred far less to the Wardell property at 3735 Columbus Avenue South. The apartment Ms. Harvey did rent was several miles from her mother's Columbus Avenue home; her son's elementary school; a Boys and Girls Club Center that her son frequented; and a neighborhood with which Ms. Harvey was familiar.²¹

22. In the weeks and months following July 25, 2006, Ms. Harvey's access to health care services, and receipt of treatment services, was substantially similar to her medical history before that date.²²

23. Ms. Harvey filed a charge of discrimination with the Minnesota Department of Human Rights.²³

24. While the Minnesota Department of Human Rights initially declined to pursue housing discrimination claims against Ms. Wardell – and so informed Ms. Wardell and Ms. Harvey of this determination by way of a December 22, 2006 letter –

¹⁷ Test. of M. Wardell; Test. of L. Harvey.

¹⁸ *Id.*

¹⁹ Ex. 8; Test. R. Ytzen .

²⁰ Test. of M. Wardell; Ex. 9-13

²¹ Exs. 8 and 101.

²² Ex. 207.

²³ Testimony of Jill Keen.

Ms. Harvey, following an appeal of that decision, persuaded the Commissioner to undertake the instant action.²⁴

25. In the spring of 2007, the Department concluded that there was probable cause to believe that Ms. Wardell had committed unfair discriminatory practices and notified her of the probable cause determination. The Department initiated this contested case pursuant to Minn. Stat. § 363A.28, subd. 6.

26. Any of the Conclusions below that are more properly characterized as Findings, are hereby incorporated by reference.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minnesota Statutes §§ 14.50, 363A.28 and 363A.29 (2006).

2. Proper notice of the hearing was timely given, and all applicable substantive and procedural requirements have been fulfilled.

3. The Minnesota Human Rights Act establishes that it is an unlawful, unfair and discriminatory practice for an owner of real property:

(1) to refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property because of ... status with regard to public assistance ...; or

(2) to discriminate against any person or group of persons because of ... status with regard to public assistance ... in the terms, conditions or privileges of the sale, rental or lease of any real property or in the furnishing of facilities or services in connection therewith ...

(3) to ... make any ... inquiry in connection with the prospective purchase, rental or lease of any real property, which expresses directly or indirectly, any limitation, specification or discrimination as to ... status with regard to public assistance²⁵

4. Under Minn. Stat. § 363A.09 it is an unfair and discriminatory practice to seek a higher total rent from a rental applicant who is enrolled in a public assistance program than is asked of an applicant who is not a participant in such a program.

²⁴ Ex. 16; Test. of J Keen.

²⁵ See, Minn. Stat. § 363A.09 (1) (2006).

5. At the times relevant to this proceeding, Ms. Harvey was enrolled in the Housing Choice Voucher Program and had a "status with regard to public assistance" as those terms are used in Minn. Stat. § 363A.03 (47) (2006).

6. Ms. Wardell sought a higher total rent from Ms. Harvey than she did from other rental applicants because Ms. Harvey was enrolled in the Housing Choice Voucher Program. Such a practice unfairly discriminates in the terms of the leasing of real property and is unlawful.

7. Ms. Harvey failed to establish by a preponderance of the evidence that she is entitled to an award of compensatory damages, or punitive damages, as a result of Ms. Wardell's unfairly discriminatory business practice.

8. The record does not establish that Ms. Harvey sought or received treatment for ailments caused by Ms. Wardell's discriminatory business practice. Ms. Harvey failed to establish by a preponderance of the evidence that she suffered compensable physical injuries as a result of Ms. Wardell's discriminatory practice.

9. Requiring Ms. Wardell to modify her rental agreements, display anti-discrimination posters and make periodic reports to the Commissioner, as specified below, will effectuate the purposes of Chapter 363A and are "just and equitable" remedies.²⁶

10. Taking into account the seriousness and extent of Ms. Wardell's violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent, the Administrative Law Judge concludes that a civil penalty of \$1,000 is warranted.²⁷

11. These Conclusions are made for the reasons set forth in the Memorandum below and that Memorandum is incorporated here by reference.

ORDER

Based on the foregoing Conclusions, IT IS HEREBY ORDERED:

1. Ms. Wardell will hereby cease and desist from collecting, or seeking to collect, total rents for units leased to clients enrolled in the Housing Choice Voucher Program that are higher than the total rents sought or collected from tenants who are not enrolled in the Housing Choice Voucher Program.

2. For a period of five years from the date of this Order, the Respondent, Ms. Wardell, shall include in any lease or rental agreement used in relation to the property at 3735 Columbus Avenue South, in Minneapolis, Minnesota, such anti-discrimination provisions as the Commissioner shall direct.

²⁶ See, Minn. Stat. §§ 363A.29 (3) and (5)(2) (2006).

²⁷ See, Minn. Stat. § 363A.29 (4) (2006).

3. For a period of five years from the date of this Order, the Respondent, Ms. Wardell, shall post at 3735 Columbus Avenue South, in Minneapolis, Minnesota, in a common area readily accessible to prospective tenants, such information relating to fair housing guarantees as the Commissioner shall direct.

4. For a period of five years from the date of this Order, the Respondent, Ms. Wardell, shall furnish to the Commissioner, on an annual date of the Commissioner's choosing, copies of any lease or rental agreements entered into during the preceding year and a listing of the monthly rents received from, or for the benefit of, each tenant.

5. The Respondent, Ms. Wardell, shall reimburse the Department for all litigation and hearing costs, as later determined appropriate under Minn. Stat. § 363A.29, subd. 11.

6. Within 10 working days of the Department's receipt of the August 2008 invoice from the Office of Administrative Hearings, counsel for the Department will submit a declaration documenting the expenses incurred by the Department in this matter.

7. Within 10 working days of the date of this Order, counsel for the Complainant-Intervenor will submit a declaration documenting the time and expenses incurred in this matter.

8. Within 30 calendar days of the date of this Order, the Respondent, Ms. Wardell, shall remit a \$1,000 civil penalty to the State of Minnesota.

9. Within 30 calendar days of the entry of an Order as to the Complainant-Intervenor's attorneys fees and costs, the Respondent, Ms. Wardell, shall remit the sums designated by the Administrative Law Judge to the Legal Aid Society of Minneapolis.

This Order constitutes the final decision in this matter and is effective immediately.

Dated: August 20, 2008

/s/ Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This order is the final decision in this case under Minn. Stat. § 363A.29. Under Minn. Stat. § 363A.30, the Commissioner of the Department or any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. Ch. 14.

MEMORANDUM

In many respects, the case at bar is not a typical housing discrimination claim. As described in greater detail below, this case includes a number of novel legal and policy questions – and the equities between the parties are as not clear, or as sharp, as they might be in other suits relating to discriminatory practices.

I. Preliminary Matters

Before turning to the substance of the discrimination claims, two preliminary matters need to be addressed – first with respect to whether one of Ms. Harvey's separate discrimination claims was sufficiently pled, and second, as to the proper resolution of the parties' competing claims of spoliation of evidence.

With respect to the first issue, Ms. Wardell asserts that because neither the Commissioner's nor the Complainant-Intervenor's Complaint references Minn. Stat. § 363A.09 (1)(3) – relating to inquiries in connection with discriminatory lease terms – Ms. Harvey should not be permitted to receive relief under this provision. The Administrative Law Judge agrees. The claim that Ms. Harvey is entitled to relief because Ms. Wardell made an unlawful inquiry during the meeting on July 25, 2006, appears to have been raised for the first time by Harvey's counsel during closing argument. A review of the contents of the underlying records, including the materials developed during pre-hearing discovery and motions practice, make clear that Ms. Wardell was only on notice that the Commissioner and Ms. Harvey contended that Wardell's lease terms (and not Wardell's interview questions) were unlawful. While a claim for relief might have been possible on this separate ground, if it was asserted before the hearing, it was raised too late for Ms. Wardell to be expected to meet it.²⁸

By way of competing *motions in limine*, the parties sought relief for the claimed spoliation of essential evidence by an opposing party. Ms. Wardell complained that a tape recordings of telephone interview between she and an investigator from the Department were wrongfully destroyed, depriving her of valuable exculpatory evidence. Similarly, the Department and Ms. Harvey complained that Ms. Wardell wrongfully destroyed Ms. Harvey's rental application – an application which they claim demonstrated Ms. Harvey's fitness as a prospective tenant. Because both items relate to the nature of Ms. Harvey's rental references, and each item was destroyed under circumstances in which the item's later usefulness and importance should have been apparent to the person disposing of it, the Administrative Law Judge initially announced

²⁸ Compare, Commissioner's Complaint and Intervenor's Complaint with Minn. R. 1400.5600 (5) (2007) (Amendments to the Notice and Order for Hearing which introduce new issues, which are "sought after the start of the hearing must be approved by the judge"); *Tomlinson Lumber Sales, Inc. v. J. D. Harold Co.*, 117 N.W.2d 203, 207 (Minn. 1962) ("While pleadings may be freely amended when justice so requires under Rules 15.01 and 15.02, Rules of Civil Procedure, '(t)he liberality to be shown in the allowance of amendments depends in part upon the stage of the action.' Here an issue which had not been pleaded or proved was injected into the case as a part of defendant's surrebuttal. Clearly there was no abuse of discretion on the part of the trial court in denying this belated motion") (citation omitted).

that he would make an inference that the missing items contained evidence that would have been adverse to the parties who disposed of them.²⁹

Upon review of the entire record, however, neither adverse inference is necessary, because the refusal to rent to Ms. Harvey did not turn upon the quality of her rental references. The evidence establishes that Ms. Wardell pressed applicants who are enrolled in public assistance programs to seek payment of higher total rents than Wardell otherwise charged to tenants who were not on the public assistance rolls; and that Wardell soured on Harvey's rental of the apartment following Harvey's refusal to seek approval of these higher rents. Thus, the quality of Harvey's rental references would not have had any bearing upon the claims in this case. Based upon the testimony at the evidentiary hearing, the Administrative Law Judge concludes that regardless of whether Ms. Harvey had a sparkling rental history, or no references whatsoever, Wardell would not have rented the apartment to Harvey after Harvey refused to seek approval for \$800 in total monthly rent. Likewise, the Administrative Law Judge determines that any shortcomings in Ms. Harvey's rental history would not have prompted Ms. Wardell to turn away Harvey if, like Mr. Ramos or Ms. Nelson, Harvey had obtained approval of a higher total rent package.³⁰

II. Discriminatory Treatment Claim

Perhaps it is a testament to the gains that have been made against discriminatory practices during the 43 years since the MHRA was first enacted, but it bears mentioning that in this case that the Commissioner and Ms. Harvey proceed against a landlord who shows no signs of animus toward recipients of public assistance. Unlike many of the discrimination cases that have come before, this record does not include examples of the kind of ugly bigotry or commercial cowardice³¹ that the Act was originally aimed at preventing. Ms. Wardell publicly holds out her properties for rent by Section 8 participants and credibly testified that she would delight in renting her apartments to other participants of the Housing Choice Voucher Program.³² Indeed, Wardell's testimony leaves one with the firm conviction that if she could rent each of the

²⁹ See, generally, *Foust v. McFarland*, 698 N.W.2d 24, 30 (Minn. App. 2005) ("Spoliation sanctions are typically imposed where one party gains an evidentiary advantage over the opposing party by failing to preserve evidence.... When the evidence is under the exclusive control of the party who fails to produce it, Minnesota also permits the jury to infer that 'the evidence, if produced, would have been unfavorable to that party'").

³⁰ While no evidentiary sanction is imposed in this case, the Administrative Law Judge invites both Ms. Wardell and the Department to carefully consider whether the types of records that were discarded in this case should not be routinely held, at least for a time, so as to assure that they will not be needed in any later proceedings. Compare generally, *Department of Human Rights v. Spiten*, 424 N.W.2d 815, 820 (Minn. App. 1988) (discussion on the use and introduction of transcripts of recordings of telephone conversations between Department of Human Rights' investigators and witnesses in housing discrimination investigations).

³¹ Compare, e.g., *Department of Human Rights v. Spiten*, 424 N.W.2d at 817 (landlord asserted that she did not wish to rent her home to a black woman because she believed that her neighbors would object).

³² Ex. 10; Test. of M. Wardell.

units in her building on Columbus Avenue South to a participant of the Housing Choice Voucher Program, she would do so.

Thus, this case rubs against, and reveals, an underlying fiction in the Minnesota Human Rights Act. The Act requires Minnesota landlords to accept the premise that enrollees of the Housing Choice Voucher Program are in no way different from other prospective tenants, save the source of their rent money;³³ a premise that this record establishes is simply not true. In fact, enrollees of the Housing Choice Voucher Program present themselves to local landlords with a variety of programmatic benefits and burdens that are very different from other prospective tenants. Not only are the lease terms for public assistance clients different from those that Wardell has with tenants who are not served by the program³⁴ – as is required by federal regulations³⁵ – the financial backing of a governmental entity makes the credit worthiness of Wardell's tenants on public assistance far sturdier than any of her non-enrollee tenants. As Ms. Wardell testified, in her experience, the scheduled payments from the Minneapolis Public Housing Authority arrived on time and without worry. Wardell's other tenants, by comparison, presented greater risks of non-payment.³⁶

Likewise important, federal housing authorities had determined that \$858 was a fair market rent for a 2-bedroom apartment in Minneapolis, at a time when Wardell and others were offering such spaces at lower monthly rents.³⁷ Wardell knew of the differential between the amounts that the housing authority would cheerfully pay, and the amount that non-enrollees would likely offer, and she sought to collect this difference. Indeed, even after MPHA case workers were apprised that Ms. Wardell was advertising apartments at monthly rates that were far less than the government was then disbursing to her, subsidy checks for the higher amounts continued to be sent.³⁸ As Rita Ytzen of the MPHA explained, with its packed caseloads of clients, the housing authority simply does not have the staff resources to fine tune the payment standards, or to compare the rents charged to program beneficiaries against those charged to their non-enrollee neighbors.³⁹

³³ Compare, e.g., *State by Cooper v. French*, 460 N.W.2d 2, 16 (Minn. 1990) ("Housing is a basic human need regardless of a person's personal characteristics, and the legislature has properly determined that it should be available without regard to 'race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status'") (Popovich, C.J., dissenting); compare also, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (The MHRA "reflects [Minnesota's] strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" and "plainly serves compelling state interests of the highest order").

³⁴ Compare, Ex. 201 with Exs. 6,7 and 206-11 through 206-20

³⁵ 24 C.F.R. §§ 982.308 (b)(2), (f) and (g) (2008).

³⁶ Ex. 202-8 through 202-14; Test. of M. Wardell.

³⁷ Compare, Ex. 10 with Ex. 205-B.

³⁸ Exs. 8, 9 and 203; Test. of R. Ytzen; Test of M. Wardell.

³⁹ Test. R. Ytzen.

Ms. Wardell argues that the continued dispatch of higher rent payments by the housing authority establishes that any rent disparities in her building, were either a trifle or at worst, a violation of housing program rules that falls far short of an unfair and discriminatory practice under the MHRA. The Administrative Law Judge disagrees. Even if the Commissioner's claim in this case is novel, and is not grounded in any bigotry by Ms. Wardell toward those receiving public assistance, there is direct evidence of discrimination: One set of monthly rents were sought and obtained by Wardell from non-enrollees, and another, higher set of rents were sought and obtained from those enrolled in the voucher program. This the MHRA does not permit.

III. Appropriate Relief

Both the Department and Ms. Harvey submit claims for relief in this matter, the merits of which are assessed in turn below.

A. Ms. Harvey's Claims for Relief

For her part, Ms. Harvey submits claims for compensatory damages for her pain and suffering, reimbursement of her out-of-pocket expenses, damages for lost housing opportunities and attorneys fees.

Compensatory Damages for Pain and Suffering: Ms. Harvey's claim for recovery of \$20,000 in damages for the pain and suffering associated with the loss of the opportunity to rent Wardell's apartment on Columbus Avenue South, is not well grounded in the record. While it is true, as Harvey points out, that claims for mental anguish claims under the MHRA may be based upon the subjective testimony of the claimant, and that such anguish need not be accompanied by physical injury in order to be compensable,⁴⁰ some evidence of causation of the injury is required. The record does not permit a finding that any distress Harvey suffered was occasioned by Wardell's actions – particularly as opposed to Harvey's pre-existing medical conditions. Even under legal standards that favor recoveries upon such claims, the Minnesota Supreme Court has been careful to limit the availability of such damages to "those plaintiffs who prove that emotional injury occurred under circumstances tending to guarantee its genuineness."⁴¹ Sufficient guarantees that Ms. Wardell's actions caused Ms. Harvey's injuries are not present in this record.⁴²

Compensatory Damages for Out-of-Pocket Expenses: While Ms. Harvey may well have been entitled to recover the cost of accessing the Phelps Park Boys and Girls

⁴⁰ See, *Kohn v. City of Minneapolis Fire Dept.*, 583 N.W.2d 7, 14-15 (Minn. App. 1998).

⁴¹ See, *Navarre v. South Washington County Schools*, 652 N.W.2d 9, 30 (Minn. 2002) (quoting *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 560 (Minn. 1996) and *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 437-38 (Minn.1983)).

⁴² See, *Minneapolis Police Dept. v. Minneapolis Com'n on Civil Rights*, 402 N.W.2d 125, 132 (Minn. App. 1987), *aff'd*, 425 N.W.2d 235 (Minn. 1988) ("If the violation of an individual's civil rights does not result in actual injury, an award of damages is inappropriate").

Club or the Bancroft Elementary School from the Chicago and Franklin Avenues neighborhood where she later found housing, she did not proffer any of documentary evidence in support of these claims. The record does not include any receipts, cancelled checks or financial records of any kind evidencing the claimed disbursements. On this record, Ms. Harvey's claim for recovery of out-of-pocket expenses fails.

Compensatory Damages for Lost Housing Opportunities: Similarly, the record does not support Ms. Harvey's recovery of money damages for lost housing opportunities. While it may be that Ms. Harvey did not favor the apartment she later found, as much as she liked Wardell's Columbus Avenue South apartment, there is no way to monetize this lost opportunity in a way that is not wholly speculative.⁴³

Punitive Damages: The record does not support Ms. Harvey's recovery of punitive damages for discriminatory leasing practices. While Ms. Wardell's willingness to charge higher rents to clients of the public housing authority, is of course troubling, it falls short of the punitive damage statute's requirements that there be clear and convincing evidence that she "deliberately proceed[ed] to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or ... deliberately proceed[ed] to act with indifference to the high probability of injury to the rights or safety of others."⁴⁴ From the vantage point of Ms. Wardell in July of 2006, the public housing authority timely paid the higher rents she asked for other public assistance clients, notwithstanding the fact that she publicly held out rental rates that were far lower. Indeed, the MPHA continued to pay these higher rates after it had been advised of Ms. Wardell's practice of charging disparate rates to public assistance clients. While not condoning such differentials, as they are improper, there is not clear and convincing evidence that Ms. Wardell set out to injure Ms. Harvey or that Wardell was indifferent to the impairment of Harvey's rights. An award of punitive damages, therefore, is not appropriate.

Award of a Reasonable Attorneys Fee: Ms. Harvey seeks an award of attorneys fees as compensation for the time her counsel expended on this matter. Within 10 working days of the date of this order, counsel for the Complainant-Intervenor will submit a declaration documenting the time and expenses incurred in this matter and their relationship to the equitable factors set forth in *Hensley v. Eckerhart*.⁴⁵ The other parties will likewise have 10 working days from the date of this filing to submit a response to counsel's submission.

⁴³ Compare generally, *Dodge v. Minnesota Min. and Mfg. Co.*, 278 N.W.2d 97, 99-101 (Minn. 1979) (a finding that employer had engaged in discriminatory practices against its female employees did not automatically entitle all female employees to recover damages but, rather, each was required to show that because of discriminatory practices she suffered a loss).

⁴⁴ Minn. Stat. § 549.20 (1) (2006).

⁴⁵ Compare, *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983); *State of Minnesota by Velma J. Korb, Commissioner, Department of Human Rights, and Charlene Kulesa v. John Dudziak*, OAH Docket No. 2-1700-19327-2 (2008) (<http://www.oah.state.mn.us/aljBase/170019327-rt.htm>).

B. The Commissioner's Claims for Relief

The Commissioner requests that, in addition to an order directing Wardell to cease and desist from charging discriminatory rental rates to prospective tenants who are receiving public assistance benefits, the Administrative Law Judge require Wardell to: (1) post anti-discrimination posters at her rental properties; (2) include anti-discrimination provisions in all leasing instruments; (3) provide the Department with annual reports on her rental properties for five years; (4) remit a \$10,000 civil penalty; and (5) reimburse the Department of Human Rights for some of its litigation and hearing costs. The Commissioner's requests for relief are granted-in-part.

Grants of Relief to Effectuate the Purposes of the MHRA: Requiring Ms. Wardell, for a period of five years, to include anti-discrimination clauses in her lease agreements, post information relating to fair housing guarantees and to annually report to the Department regarding the lease terms for apartments in the building on Columbus Avenue South, are all actions that are necessary to effectuate the purposes of the Minnesota Human Rights Act and are just and equitable.⁴⁶

Yet, notwithstanding an ownership stake in housing units that are managed solely by her son, because Ms. Wardell only undertakes tenant selection at the Columbus Avenue property, it seems appropriate to focus any later remediation and agency oversight on this location.

Reimbursement of Litigation and Hearing Costs: Minn. Stat. § 363A.29, subdivision 11 provides that "[t]he administrative law judge shall order a respondent who is determined to have engaged in an unfair discriminatory practice to reimburse the department and the attorney general for all appropriate litigation and hearing costs expended in preparing for and conducting the hearing, unless payment of the costs would impose a financial hardship on the respondent."

Within 10 working days of the Department's receipt of the August 2008 invoice from the Office of Administrative Hearings, counsel for the Department will submit a declaration documenting the expenses incurred by the Department in this matter. The other parties will likewise have 10 working days from the date of this filing to submit a response to counsel's submission.

Civil Penalty: Minn. Stat. § 363A.29, subdivision 4 (a) provides that "[t]he administrative law judge shall order any respondent found to be in violation of any provision of sections 363A.08 to 363A.19 and 363A.28, subdivision 10, to pay a civil penalty to the state."

Taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent, in the judgment of the administrative law judge imposition

⁴⁶ See, Minn. Stat. §§ 363A.29 (3) and (5)(2) (2006).

of a \$1,000 civil penalty that is payable to the state's general fund is appropriate. Particularly when this penalty is combined with the other relief that is granted by this Order, the sanctions imposed upon Ms. Wardell seem to be of sufficient weight and strength to deter any revival of discriminatory business practices.

E. L. L.